No. 12027

In the United States Court of Appeals for the Ninth Circuit

ESTATE OF FRANK K. SULLIVAN, DECEASED, BY FLOYD K. SULLIVAN, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
CARLTON FOX,
Special Assistants to the Attorney General.

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OPINION BELOW

The only previous opinion is that of the Tax Court promulgated May 27, 1948 (R. 90-114), which is reported in 10 T. C. 961.

JURISDICTION

The petition for review (R. 116-121) involves a deficiency in federal estate taxes determined by the Commissioner of Internal Revenue against the estate of the decedent, Frank K. Sullivan, who died January 9, 1944. On August 15, 1946, the Commissioner mailed to the decedent's estate and to Floyd K. Sullivan, the executor of the decedent's will, a notice of deficiency in estate taxes in the amount of $18,963.17. (R. 15-18.)

Within ninety days thereafter and on November 12, 1946 (R. 24), the taxpayer filed a petition with the Tax Court of the United States for a redetermination of such deficiency under the provisions of Section 871(a) of the Internal Revenue Code (R. 3-24). The decision of the Tax Court affirming the Commissioner's deficiency determination was entered May 27, 1948. (R. 115.) The proceeding is brought to this Court by the petition for review, which was filed August 2, 1948 (R. 121), under the provisions of Section 1141(a) of the Internal Revenue Code as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. Whether the bundle of rights possessed by the decedent in the property held by him and his wife in joint tenancy is an "interest" in the property, within the meaning of Section 811(c) of the Internal Revenue Code; and, if so, whether a gift made by the decedent and his wife to their son of a portion of the property and an agreement entered into between the decedent and his wife to convert the balance into common property are "transfers" made by the decedent of such interest within the meaning of the section.

2. If the agreement involves a transfer by the decedent of his interest therein within the meaning of Section 811(c), then whether such transfer is not a sale for an adequate and full consideration in money or money's worth within the meaning of the section.

3. If both the gift and agreement meet the requirement of Section 811(c) that they be transfers by the decedent of an interest which he had in the property, as well as the requirement that the contract be not a sale for an adequate and full consideration in money or money's worth, then whether only one-half of the value of the property subject to each of such transfers and

not its entire value at the decedent's death is to be included in his gross estate under the section, provided that such transfers were made by the decedent in contemplation of his death within the meaning of the section.

4. If the gift and the agreement otherwise meet the requirements of Section 811(c), then whether there is substantial evidence to sustain the Tax Court's findings that they were made by the decedent in contemplation of his death within the meaning of the section.

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved are set out in the Appendix, *infra.*

STATEMENT

Most of the essential facts were stipulated (R. 27-90), and the Tax Court adopted the stipulation in its entirety, as an integral part of its findings (R. 91). The stipulated facts, as well as those specifically found by the Tax Court (R. 91-101), may be summarized as follows:

In 1918, the decedent sold his coal business in Minnesota for $100,000 and moved with his wife and minor son to Los Angeles, California, where he invested the proceeds in income producing property.[1] (R. 92.)

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[1] In this connection the record discloses that the decedent had other property and funds when he arrived in California. The witness, Clyde C. Triplett, a lawyer whom the decedent and his wife consulted about the disposition of their property shortly before his death, testified that the decedent had told him he was worth more when he came to California than he was at that time (R. 94, 177), and the Tax Court took note of this in its findings of fact (R. 93-94). Moreover, the decedent's son, Floyd K. Sullivan, who was the executor of the decedent's will, testified that at the time of his death, the decedent and his wife were worth between $150,000 and $175,000. (R. 162.) The record does not, however, disclose the exact worth of the decedent and his wife at the time they came to California; and, though, as indicated, the record discloses that they must have

With respect to the tenure of his property, it was stipulated (par. 14, R. 35) and specifically found by the Tax Court (R. 99) that, prior to November 24, 1943, when the decedent and his wife confirmed a previous gift of property of the value of $33,526.54 to their son and made an agreement converting the balance of their property from joint into common property, all of the property held by either or both was held by them in joint tenancy, except a single item of real estate, namely, lot 31, Nadeau Villa Tr. Bell, of a value of $750, which was held by the decedent alone (Stip. par. 4(b), Item 3, R. 29). And, in this connection the Tax Court further found that the decedent and his wife had so informed an attorney, Clyde C. Triplett, whom they had consulted at the suggestion of their son, at their first conference with Triplett held on September 27, 1943. (R. 93-94.) And, finally, in this connection, it was stipulated (par. 6, R. 32-33), and particularly taken note of by the Tax Court in its opinion (R. 113-114), that, if the decedent had died immediately prior to the execution of the agreement of November 24, 1943, after the making of the gift to the son in accordance with a letter dated November 19, 1943, all of the property of the decedent and his wife, excepting only that standing in the name of the decedent alone (namely, the single lot aforesaid), would have been includible in the decedent's gross estate under Section 811(e)(1) of the Internal Revenue Code, and that the property standing in the name of the decedent alone would have been includible therein either under Section 811(e)(1) or 811(a).

The decedent resided with his wife and their son in California until his death, which occurred on January 9, 1944, at the age of seventy-seven. After the sale of

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sustained some losses after they came to California, it does not disclose what these were or to what extent or how they recouped them.

his coal business and until his death, the decedent was not employed and did not engage in any business other than to look after his interests. (R. 91-92.)

In 1930 he gave his son and the latter's wife a house and a lot in Beverly Hills. (R. 92.)

In 1931, the son became a member of a partnership engaged in the general brokerage business, and the decedent then deposited $25,000 in securities with a bank for use by the partnership as collateral in connection with sales and purchases. The partners sustained losses in this venture. The decedent's loss therein was about $12,000. In settlement of such loss, the son and his wife conveyed to the decedent a duplex apartment, of a value of about $7,500, which had been inherited by the decedent's son's wife. The partnership was dissolved in August, 1934. (R. 92-93.)

In 1943, the son was forty-four years of age and had a daughter thirteen years old. His earnings in 1940, 1941, 1942 and 1943 were $3,425, $2,768, $4,481 and $5,221, respectively. (R. 93.)

In 1943,[2] the decedent and his wife informed their son of their desire to make a gift to him in order, as they then told him, to enable him to make payments on the mortgage on his house and to make it easier for him to meet his obligations,[3] whereas shortly thereafter on

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[2] The son testified that this was in the middle of September, 1943. (R. 127.)

[3] In this connection, the Tax Court had already found that in 1933, in order to pay the household expenses and other deficits incurred in the brokerage business, the son had borrowed $7,500 on the house his father had given him (R. 92-93), and further, that the son had been making payments for ten years on the mortgage (R. 93). But the record does not disclose how much the son had paid on the loan during the time or what the balance of it was in 1943; nor does it disclose the precise amount of the gift which the decedent and his wife intended at first to make to their son. However, the lawyer Triplett testified that when he told the decedent and his wife at their first conference, held on September 27, 1943, that they could make a gift of $33,000 which would be free from

September 27, 1943, they informed Triplett that the gift was intended "to augment their son's income." (R. 93.) The precise testimony of the son with regard to the reasons his parents gave him for making the gift to him was that he had quite a lot of obligations and bills and a rather sizeable mortgage on a home at the time; that his father and mother had said they would like "to repay the cost in order to make it a little easier for me and they wanted to make a gift." (R. 126.) On the other hand, Triplett testified that Mrs. Sullivan had said to him: "What we wanted to give him, what we want to give him is something that will give him some additional income." (R. 174.) The gift was, however, not made until November 19, 1943, when it was evidenced by a letter of instructions to the brokers who held the stock, signed by the decedent and his wife. (Stip. par. 5(d), R. 32.) This letter is attached to the stipulation as Exhibit 1(A). (R. 38-39.) But the amount of the gift thus made was $33,526.54.[4] (Stip. par. 4(d), R. 29-30.)

In the meantime, another meeting between the decedent, his wife, and Triplett was held in the latter's office on November 9, 1943. At this time, Triplett informed the decedent that it was not a good idea to hold his property as a joint tenant since upon the death of a joint tenant it passed to the survivor and was includible in the gross estate of the decedent. Triplett

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the federal gift tax if they had made no prior gifts, the decedent's wife said that they, referring to herself and the decedent, did not have in mind giving him that much; what they wanted to give him was "something that would give him some additional income." (R. 175.) However, she later stated to Triplett that they had in mind giving their son "about half of what I suggested they could give him." (R. 175.)

[4] We think it is obvious the decedent and his wife increased the amount of the gift which they had originally intended to make to the son, as testified to by the witness Triplett, to the amount stated because of his advice that a tax free gift in the amount of $33,000 could be made by them. (R. 174.)

further said it was advisable to terminate the joint tenancy and to divide the property between them as tenants in common, or to divide it in kind, such as could be so divided. Triplett expressed the opinion that the transaction would be a non-taxable exchange and that thereafter one-half of the property would be in the wife's estate, so that the ultimate tax savings would not be very much, and that such transfer would involve additional probate expenses. Thereafter the decedent informed Triplett that he and his wife thought Triplett's advise was sound and requested him to draw the necessary legal documents to convert the title to the property into tenancies in common. (R. 94-95.)

On November 7, 1943, that is, two days before the last mentioned conference between the decedent and his wife and Triplett, the decedent consulted a doctor. The doctor's report of the consultation shows that the decedent's appearance at that time was "deep amber." (R. 47.)

On November 18, 1943, the decedent was admitted to the Cedars of Lebanon Hospital for treatment. (R. 34.) The doctor's record of that date shows that the decedent had felt quite well up to about three weeks before that time (that is up to about October 27, 1943), and that since then there were no definite complaints except jaundice—yellow skin—noted in the last three days; loss of weight, fifteen pounds in the past year and eight pounds in the past two months, no great loss having occurred before, but that the decedent had not eaten less to account for that, lack of appetite being noted only in the last week and that the decedent had previously eaten everything with zest, though less the last few days; weakness had been present only in the last few days, but was not marked; drowsiness had also been present in the last few days; abdominal pain began four or five days before as a tenderness beneath the right

costal margin, but left after a few days and was never sharply defined. (R. 48.)

The records of the hospital as of date November 21, 1943, disclosed the diagnosis of the decedent's ailment to have been "obstructive jaundice, cause not determined." (R. 43.) The decedent remained in the hospital until November 24, 1943, when he was discharged, with the following notation on the hospital records of that date signed by the doctor: "IMPRESSION: Obstructive Jaundice Probable Ca of Pancreas." (R. 46.) The Tax Court found the facts with regard to the decedent's illness, etc., to be in substance as above stated and in addition that the doctor had discharged the decedent as a surgical case. (R. 96-97.)

On November 24, 1943, a short time before the decedent left the hospital, his son arranged with Triplett for a meeting of the latter and the decedent and his wife in one of the apartment houses owned by the decedent for the purpose of executing the contract changing the tenancy of their jointly held property to common property. Such meeting was thereafter held on that day and the contract then executed, as well as certain deeds and assignments carrying the agreement into effect. (R. 97-98.) In this connection, the Tax Court found that the division of the property on November 24, 1943, was the result of suggestions made by Triplett. (R. 99.) On November 26, 1943 a letter was written by the First California Company to one Philip C. Jones, confirming the record ownership of the securities which were the subject of the gift referred to in the letter of November 19, 1943, above mentioned. (Ex. 2-B, R. 40-41.)

After the various documents were executed, Triplett, at the same conference suggested that the decedent and his wife permit him to examine their wills under which each had left his or her property to the other. He expressed to them the opinion that their wills should each

leave a life estate in the property to the survivor with the remainder over to the son, as such a plan might avoid a subsequent probate proceeding and tax expense. The decedent did not, however, like the idea, stating that if his wife predeceased him, he could look after his own affairs. At the time, the decedent informed Triplett that the doctors thought he had something wrong with his gall-bladder but he thought they did not know what they were talking about. (R. 99-100.)

New wills were drafted by Triplett for the decedent and his wife and were thereafter executed on November 30, 1943. The will of the decedent left all of his property to his wife for life with the remainder interest to his son. In the event his wife predeceased him, all of his property was to go to his son. Provision was also made for the disposition of the property in the event both his wife and son predeceased him. The will of the decedent's wife did not contain a provision to give him a life interest in her property. (R. 100.)

From the foregoing facts the Tax Court made its ultimate finding that the transfers made on November 19, 1943, and November 24, 1943, were made in contemplation of death and that the latter was not a bona fide sale for an adequate and full consideration in money or money's worth. (R. 101.)

The case was reviewed by the entire Tax Court and its decision for the Commissioner entered without dissent. (R. 114.)

SUMMARY OF ARGUMENT

Preliminary

The Tax Court included the value of the property here in question in the decedent's gross estate under Section 811(c) of the Internal Revenue Code on the basis of its finding that the decedent had made the transfers of his interest therein in contemplation of his death

within the meaning of that section. It did not include it under Section 811(e) as jointly held property, as the taxpayer (as well as the friends of the Court) contends.

The importance of the local law regarding jointly held property lies only in the fact that such tenancy by husband and wife is permissible under the California law, and in the further fact that, in California as elsewhere generally, the primary incident of jointly held property is the right of survivorship. Local law is also important here in its specification of the manner in which such tenancy may be dissolved.

Beyond that, however, the federal law controls in regard to the four questions presented, namely (1) whether the bundle of rights which the decedent had in the property is an interest therein and whether the dispositions he made thereof by gift and contract were transfers within the meaning of Section 811(c); (2) if the contract was such a transfer, then whether it was not a sale for an adequate and full consideration in money or money's worth within the meaning of the section; (3) whether, if the gift and contract otherwise meet the requirements of Section 811(c), the value of the entire property, or of only a portion thereof, is includible in the decedent's gross estate, and (4) whether the transfers were made by the decedent in contemplation of his death.

An *amicus* brief concerns itself only with the first three questions, conceding the fourth, in effect.

I

The bundle of rights which the decedent had in the property which he jointly owned with his wife is an interest therein within the meaning of Section 811(c). The decedent did not merely have an undivided half interest therein; his interest extended to the whole. The

right of survivorship is only one of the incidents of joint tenancy and is itself an interest in the property so held. Moreover, by the gift and contract, the decedent made transfers of such interest, i.e., of his entire bundle of rights in the property, including his right of survivorship. And so far as concerns the contract, he did not merely relinquish that right. By the gift the decedent transferred to his son all of his interest in the property, including the right of survivorship. It is immaterial that, as a result of the gift, the right of survivorship disappeared.

The contention that the right of survivorship is not an interest in the property within the meaning of Section 811(a) because not includible therein under that section, and that it is, therefore, not an interest therein within the meaning of Section 811(c), is without merit. It is not includible under Section 811(a) because it ceases at the decedent's death, not because it is not an interest.

Nor is the right of survivorship substantially similar to a general power of appointment, which is likewise not includible under Section 811(a). Unlike the right of survivorship, such power is not an interest in the property within the meaning of Section 811(a), but only a right exercisable in respect thereof.

The right of dower (or courtesy) also presents no analogy. While such right is regarded as an interest in property, it is not the right of dower (or courtesy) of the *decedent* in his property which is includible in his gross estate, but the right which the *survivor* has therein in virtue of his (or her) relationship to the decedent. It is obviously for this reason that such right is not includible under Section 811(a).

But, as stated, we are not dealing here alone with the relinquishment of the right of survivorship. We are dealing with dispositions by the decedent of his interest

in jointly held property, and such dispositions are "transfers" within the meaning of Section 811(c).

The word "transfer" as used in that section has been given an ever wider connotation by both the Congress and the courts. The cases cited by the friends of the Court involving a renunciation of a testamentary gift and the relinquishments of a general power of appointment are not apposite here.

II

The contract was not a sale for an adequate and full consideration in money or money's worth within the meaning of Section 811(c). Each joint tenant could have dissolved the tenancy by unilateral action, even without the knowledge or consent of the other, and each could have relinquished his interest therein to the other, without consideration. Moreover, the contract was merely a family arrangement of the type which does not import a consideration for federal tax purposes. Finally, the two Third Circuit cases cited by the friends of the Court have, as they themselves say, been legislatively overruled. The result of such reversal, as pointed out by the Supreme Court, is that a release of dower cannot be regarded as being made for an adequate and full consideration in money or money's worth within the meaning of the section.

III

The value of the whole of the jointly held property is includible in the decedent's gross estate if the transfers made by the decedent of his interest therein were made in contemplation of his death. It is necessary so to construe the statute in order to implement its purpose to prevent the evasion of the estate tax by the making of substitutes for testamentary dispositions. Such construction, moreover, does no violence either to the joint

tenancy concept, or to the Section 811(c) concept, of the interest which the decedent had therein. For such interest extended to the whole, each tenant being regarded as the owner of the whole. Section 811(c), as well as other federal statutes, has been broadly construed by the courts in other respects in order that their purpose be not defeated. There is no reason why Section 811(c) should not be accorded a similarly broad construction here. There is no merit to the contention that the word "interest" as used in Section 811(c) should be construed the same as it is when used in Section 811(a). Congress has frequently used words with different connotations even in the same statute, and it has obviously done so here.

IV

The transfers were made by the decedent in contemplation of his death within the meaning of Section 811(c). The gift, the contract and the will constituted steps in an integrated transaction designed to effect a final disposition of all of the decedent's worldly possessions. That being so, such disposition, and each component part thereof was obviously made by him in contemplation of his death. Moreover, the decedent made the transfer in contemplation of his death in the basic sense of anticipating the possibility of dying in the more or less immediate future. Such final disposition of the property was conceived and carried out by him during his last illness, and the contract, as an integral part of such disposition, was made in order to evade the federal estate tax. No dominant life motive for the transfers is apparent. Moreover, the possible coexistence of a life motive therefor, or for any part thereof, is immaterial because of the fact that the decedent's dominant purpose therefor appears to have been to make a disposition of the property in view of

his death and in order, in part at least, to evade the federal estate tax.

ARGUMENT

The Tax Court's Findings and the Basis of its Decision

The taxpayer's argumentative statement of facts (Br. 6-16), as well as its presentation to the Court of sixteen questions (Br. 17-21) and thirty-six assignments of error and specifications of the insufficiency of the evidence to sustain the findings (Br. 22-27), is obviously the result of its misconception of the Tax Court's findings and the basis of its decision in two important respects.

The first of these (Br. 47, 50) is the taxpayer's conclusion that the Tax Court failed to find and to assume as a basis of its decision that all of the property involved in the gift, made by the decedent and his wife to their son, was their joint property, regardless of how it was actually held. From this premise, the taxpayer argues that the Tax Court erroneously held the decedent to have been the sole owner thereof and that it thus, in effect, found the gift to have been made by the decedent alone, with the result that, instead of including only the value of one-half (the decedent's half) of the property in his gross estate, it included the value of his wife's half as well in disregard of her rights in the property under local law.

But there is no justification for saying that the Tax Court made no finding with regard to the character of the property, or that it failed to find that it was jointly held. As disclosed in our statement of facts, the Tax Court adopted the stipulated facts (R. 91), among which was the fact that the tenure of all of the property subject to the gift was at the date thereof held by the decedent and his wife in joint tenancy. (Stip. par. 14, R. 35.)

Moreover, in this connection, it was also stipulated (Stip. par. 6, R. 32-33)—and it is so stated in our statement of facts—that the property would but for the gift have been includible in the decedent's gross estate as jointly held property under Section 811(e)(1) of the Internal Revenue Code (Appendix, *infra*). And it is here particularly to be noted that the Tax Court adverted to this in its opinion. (R. 113-114.)

The taxpayer's second misconception of the Tax Court's findings and the basis of its decision relates to what the taxpayer obviously regards as an alternate, but actually inconsistent basis for the Tax Court's inclusion in the decedent's gross estate of the entire value of the property which became the subject of the gift to their son, as well as the sole basis for the Tax Court's inclusion therein of the entire value of that which became the subject of the agreement between the decedent and his wife to convert the balance of their property into common property.

The taxpayer's contention here is epitomized in the following statement found in Point II of its brief (pp. 41-54), which embodies its contention with regard to the includibility in the decedent's gross estate of the value of the property given by the decedent and his wife to their son. This is to the effect (Br. 49) that, while the Tax Court confirmed the Commissioner's determination that such property was includible in the decedent's gross estate under Section 811(c) (Appendix, *infra*) as a transfer made in contemplation of death, it in fact imposed the tax not under that section but under Section 811(e), which requires the inclusion in the decedent's gross estate of property held jointly at the date of his death. A similar epitomy of the taxpayer's contention will be found in Point III of its brief (pp. 55-73), embodying its contention that the balance of the property which became the subject of the

agreement was not includible in the decedent's gross estate (Br. 56). While, as stated, this view of the Tax Court's findings and decision forms an alternate basis for the taxpayer's contention that the value of the property subject to the gift is not includible in the decedent's gross estate, and the primary basis for its contention that the value of the property subject to the agreement is not includible therein, such view is more elaborately stated and developed in the taxpayer's third point relating to the agreement than in its second point relating to the gift.[5]

The taxpayer's contention in this regard is, however, without basis in point of fact. To the contrary, the express finding of the Tax Court is that both the gift and agreement were made in contemplation of the decedent's death and, in this connection, that the agreement was not a *bona fide* sale for adequate and full consideration in money or money's worth. (R. 101.) Obviously, that finding is one which is solely designed to bring both the gift and the contract within the contemplation of death provisions of Section 811(c). By contrast, there is no finding either circumstantial or otherwise which would justify the inclusion of the value of the property in the decedent's gross estate under Section 811(e)(1), so that on its face the taxpayer's contention does violence to the Tax Court's findings and its decision which is based thereon.

Moreover, a perusal of the Tax Court's opinion (R. 102-114) discloses that it is entirely devoted to a discussion of the various contentions of the parties for and against the inclusion in the decedent's gross estate of the property subject to the gift and contract, on the

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[5] An *amicus* brief filed by some ten San Francisco lawyers and their law firms, at pp. 30 and 40 thereof cavalierly supports this view, by assuming, without any discussion however, that this is the basis for the Tax Court's inclusion in the decedent's gross estate of the value of the property which became the subject of the contract.

ground that both constituted transfers in contemplation of his death of an interest which the decedent had therein, within the meaning of Section 811(c), and if the contract was to be regarded as such as to whether or not it was a *bona fide* sale for an adequate and full consideration in money or money's worth within the meaning thereof.

To be sure, the Tax Court discussed Section 811(e)(1), but only to show that, but for the transfers, all of the property subject thereto would have been includible in the decedent's gross estate thereunder, because it would then have remained joint property at the decedent's death. But the only point which the Tax Court sought in that connection to make is that Section 811(c) in effect treats the interest of the decedent in property which is the subject of an *inter vivos* transfer in contemplation of death, but which would otherwise have been includible in the decedent's gross estate at his death under one of the other subdivisions of the section involving the inclusion in the gross estate of such an interest, as though the decedent had retained such interest at death so that it would be includible in his gross estate under such other subsection. In support, the Tax Court cited a number of decisions, primarily that of the Fifth Circuit in *Igleheart* v. *Commissioner,* 77 F. 2d 704, quoting the following language therefrom (p. 711):

> For the purposes of the tax, property transferred by the decedent in contemplation of death is in the same category as it would have been if the transfer had not been made and the transferred property had continued to be owned by the decedent up to the time of his death.

The Tax Court, however, also cited as being to the same effect the decision of the Sixth Circuit in the case of *In re Kroger's Estate,* 145 F. 2d 901, certiorari denied,

324 U.S. 866, as well as its own decisions in *Estate of Hornor* v. *Commissioner,* 44 B.T.A. 1136, and *Estate of Koussevitsky* v. *Commissioner,* 5 T. C. 650.

A word should be said with regard to the taxpayer's contention that the state law is controlling here. Of course it is, but only to the extent that it determines the character of the interest which each joint tenant has in joint property, including the extent of the power he has over its disposition. But the incidents of joint tenancy are no different in California from what they are elsewhere, and these are well understood.

Thus, the importance of the California law of the tenure of property by husband and wife, so far as concerns the federal estate tax, is twofold. It lies first in the fact that California recognizes the tenure of property by husband and wife in joint tenancy and that it is separate and distinct from community property on the one hand and from common property on the other; and, secondly, in the fact that each tenant may dispose of his interest therein, as well as in the manner in which he may do so. But the fact that the three tenancies above mentioned may have common incidents and that a conversion of any one of them into another results in a retention of such incidents is of no importance. What is important is the fact that there are incidents in each which differentiates it from the others. Thus, the important incidents of jointly held property which distinguish it from both community and common property are, first, the right of survivorship to the whole, and secondly the fact that, as a result, the disposition by one of the joint tenants of any part of it by will is ineffective unless he survives the other. Jointly held property is also distinguishable from community property, though not from common, in that a joint tenant may alone dissolve the tenancy and may do so even without the knowledge or consent of his co-

tenant. Indeed, these are the three incidents of jointly held property which are of primary importance here. The others are only of secondary importance in that they complete the bundle of rights each tenant has in the property. These are (1) that each tenant is during the continuance of the tenancy entitled to the possession and enjoyment of the whole thereof, in which respect it is different from both community and common property, though ~~from~~ for wholly different reasons; (2) that the income from jointly held income bearing property belongs one-half to each tenant, which, however, is common to all three tenancies, with certain possible qualifications as regards community property which are not material here; (3) that only one-half of jointly held property may be taken for the debt of a co-tenant, similarly as in the case of common property, but unlike in the case of community property, with possible qualifications not material here.

To sum up: The importance of the local law of property lies only in the fact that it is determinative of the right, title and interest of its owners therein, both before and after its disposition, including the time and manner in which such right, title and interest may be disposed of. But whether the incidents of ownership, or the time and manner of their disposition, brings such disposition within the federal taxing statute is solely one of federal law. *Burnet* v. *Harmel,* 287 U.S. 103, 110; *Palmer* v. *Bender,* 287 U.S. 551, 555; *Lyeth* v. *Hoey,* 305 U.S. 188; *United States* v. *Pelzer,* 312 U.S. 399, 402, 403; *Helvering* v. *Stuart,* 317 U.S. 154, 161; *Estate of Rogers* v. *Commissioner,* 320 U.S. 410, 414; *Estate of Putnam* v. *Commissioner,* 324 U.S. 393, 395-396.

Thus, the four questions here presented are to be determined by the federal and not the state law, for each of them involves the evaluation of concepts of

federal law and, as is made clear by the authorities above cited, their meaning should be uniform because the federal revenue act is applicable throughout the nation. These questions are: (1) whether the bundle of rights which the decedent possessed in the property under state law is an "interest" therein and whether the dispositions he made thereof by way of gift and contract were transfers thereof, within the meaning of Section 811(c) of the Internal Revenue Code; (2) whether, assuming that the agreement involved a transfer of the decedent's interest in the property, it was not a sale for an adequate and full consideration in money or money's worth, within the meaning of the section; (3) whether, if the gift and agreement otherwise meet the foregoing requirements of the section, only one-half of the value of the property subject to each of such transfers, and not its entire value at the decedent's death, is includible in his gross estate, provided that such transfers were made by the decedent in contemplation of his death within the meaning of the section; and, finally (4) whether the transfers of such interest were made by him in contemplation of his death within the meaning of the section.

An *amicus* brief [6] in support of the taxpayer's first three contentions was filed by a number of San Francisco lawyers and law firms because these three questions allegedly are of great general importance. But these friends of the Court professedly represent no clients directly interested in the questions presented in this case, but only taxpayers generally who may be similarly situated and among whom some of their present and future clients may appear. They assert that they do not discuss the fourth question because, in their view, it lacks like importance. And, yet, that question is, in our view, the all important one in this

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[6] Already referred to in fn. 5, *supra*.

case and is, besides, so closely and directly related to the others as not to be separable therefrom in any discussion of the problems presented in this case. The result is that the *amicus* brief is inconclusive. It is, besides, predicated solely on the existence of alleged quirks in both the state and federal law, which the friends of the Court seek to import into the latter and thereby to defeat the well understood dominant purpose of Congress to reach substitutes for testamentary dispositions in order to prevent the evasion of the estate tax, such as those here in question obviously are. *United States* v. *Wells,* 283 U.S. 102, 117; *Nichols* v. *Coolidge,* 274 U.S. 531, 542; *Milliken* v. *United States,* 283 U.S. 15, 20; also *Heiner* v. *Donnan,* 285 U.S. 312, 323. In any event, the fact that they do not attempt to support the taxpayer's contention that the gift and contract were not made by the decedent in contemplation of his death is adequately to be explained only on the ground that they regard such contention as insupportable.

It is submitted that the tenuous construction of the federal statute for which both the taxpayer and the friends of the Court contend in order to defeat its purpose does violence to what we regard as its plain, obvious and rational meaning, which, as the Supreme Court said in *Lynch* v. *Alworth-Stephens Co.,* 267 U.S. 364, 370, adopting the language of the Eighth Circuit in that case—

> is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

We turn to the separate consideration of the merits of each of the questions presented.

I

The bundle of rights possessed by the Decedent in the jointly held property is an "interest" of which the Decedent made a "transfer" within the meaning of Section 811(c) of the Internal Revenue Code

We think it goes almost without saying that the bundle of rights which the decedent had in the joint property at the time the gift and the contract here in question were made represents an interest of the decedent therein not only under Section 811(c) of the Internal Revenue Code, but under California law, as well. It will not be necessary to recount these rights. Suffice it to say that the right of survivorship is one of incidents of that interest. Moreover, such right might at any moment, so long as the tenancy existed, ripen into a complete ownership of the property in the decedent by the death during his lifetime of his co-tenant. But such interest is not merely an interest in one-half of the property. It extends to and affects the whole of it, so that any disposition by a joint tenant of his interest in jointly held property extends to and affects the whole in a tax sense, though it does not, of course, comprise the whole.[7]

[7] The contention of the friends of the Court (Br. 45-46) that the word "interest" as used in Section 811(a) (Appendix, *infra*) is a word of art is not worthy of extended answer. No court has ever so held, or, as we believe, is likely to do so. The contrary is true. Certainly, the friends of the Court do not pretend to give any artful definition of the word as used in the statute, and they cite no authority or reason for limiting its application even to conventional interests in property. The fact that the word "interest" as used in the section does not comprise all rights in property is of no moment; for it does not comprise them even in its ordinary connotation. Moreover, as we shall presently show, the word "transfer" as used in Section 811 in connection with the word "interest" is not only not a word of art, but is not even used therein in its ordinary sense, for it has from time to time been accorded an even broader connotation by both Congress and the courts in the death tax statute, in order to encompass transactions which do not involve a transfer of property, or of an interest therein, in the ordinary sense. See

As regards the gift to the son, with which the friends of the Court do not however deal but only the taxpayer, the latter contends (Br. 45) that the decedent and his wife each made a gift of an *undivided* one-half interest in the property which the taxpayer says each owned therein. In other words, the taxpayer treats the gift by each tenant of jointly owned property as though it were a gift by each of a half interest therein held by them in common. Thus, the taxpayer's contention that each made a gift of a half interest in the property does not take into account the fact that the decedent had a right of survivorship in the property and, as a result, an interest in the whole, and that the gift of his interest was a gift of an interest in the whole, which included the right of survivorship. In this connection, the friends of the Court, though not the taxpayer—at least not explicity—seek to buttress this contention by asserting (Br. 47-49) that such right of survivorship is itself not an interest in property at all within the meaning of Section 811(c).

But, as already indicated, it is not true to say that the gift constitutes only a transfer by the decedent of an

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e.g., *Burnet* v. *Guggenheim,* 288 U. S. 280, 286-287, which with many other authorities along the same line, is hereinafter more particularly referred to. Thus, speaking of the power of Congress to impose death taxes, the Supreme Court said in *Fernandez* v. *Wiener,* 326 U. S. 340, 352:

> It is true that the estate tax as originally devised and constitutionally supported was a tax upon transfers. *Knowlton* v. *Moore,* 178 U. S. 41; *Y.M.C.A.* v. *Davis,* 264 U. S. 47, 50. But the power of Congress to impose death taxes is not limited to the taxation of transfers at death. It extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property, and when any of these is occasioned by death, it may as readily be the subject of the federal tax as the transfer of the property at death. See *Bromley* v. *McCaughn,* 280 U. S. 124, 135, *et seq.*

As hereinafter more fully shown, the exercise by Congress of such power has actually extended to every incident of the ownership of property mentioned by the Court.

undivided half interest therein. To the contrary, the gift represents a transfer by the decedent of his undivided interest in the whole of the property, including the right of survivorship. To be sure, such right was not transferred in the sense that it was conferred as such upon the donee. However, in virtue of the gift, the donee acquired all of the incidents of the decedents's ownership in the property, in which the right of survivorship became merged and disappeared. But the fact that it did so is of no moment here. Obviously, the decedent's gift involved something more than a gift of a half interest in the property. It follows that the taxpayer leaves completely unanswered the question whether Congress intended by Section 811(c) to encompass a transfer by way of gift of a joint interest in property, if made in contemplation of death. Of course, that question cannot properly be answered without taking the right of survivorship into consideration. This is so because it is precisely that right, coupled with the fact that no part of the property was shown originally to have belonged to the decedent's wife or to have originated entirely with her, which brings the property in the first instance within the purview of another subsection of the statute, namely, Section 811(e).

Since, as we have shown, the decedent by the gift made a transfer of his interest in the property and that such interest extended to the whole thereof, involving, as it did, a relinquishment by him to the donee of his right of survivorship therein, it follows that the transfer of such interest falls within the ambit of Section 811(c). Thus, the only question which remains is whether the whole or only a portion of the value of the property is includible in the decedent's gross estate. This question we shall hereafter consider under our third point.

As regards the contract, the contention of both the

taxpayer (Br. 57-58) and the friends of the Court (Br. 47-49) in effect is that a release by each of his right of survivorship does not involve a transfer of an interest in the property but only a release by each of his right of survivorship, which was merely terminated thereby. Thus, by contrast with the taxpayer's contention as regards the gift, all aspects of the conversion of the tenure of the property from a joint estate to one in common are disregarded, excepting only the release of the right of survivorship resulting from the conversion. It follows that the applicability of Section 811(c) is made to turn solely on the effect of such release. On this premise, both the taxpayer and the friends of the Court argue that there was no transfer of any interest, for such relinquishment did not, in their view, constitute a *transfer* of any *interest* which the decedent had in the property, within the meaning of the federal statute, but only a *release* of a *right* which he had therein, namely the right of survivorship.[8]

The fallacy of this contention lies in the fact that the contract converting the joint tenancy of the property into property held in common did not merely involve a release of the right of survivorship. It involved, dealt with, and destroyed the joint tenancy in its entirety, a wholly new and different tenancy being created thereby in its stead. No one would contend, we apprehend, that a conversion by contract of community property into joint property involved only the destruc-

[8] To be sure, both the taxpayer (Br. 58) and the friends of the Court (Br. 13-15) contend that the contract was a sale by each to the other of his interest therein for a full consideration in money and money's worth within the meaning of Section 811(c). But, aside from the fact that, as we shall hereafter show under our second point such contention is without merit, it is obviously, similarly as the taxpayer's contention with regard to the gift, inconsistent with the contention of both the taxpayer and the friends of the Court that the contract involved merely a release of the right of survivorship and therefore not an interest in the property.
a transfer of

tion of the power of the husband to manage the property, or the destruction of the right of the survivor to take his one-half interest in the property at the death of the other free from the claims of the deceased spouse's heirs to the whole. Similarly, no one would contend that a conversion by contract of common property into joint property was no more than the addition of the right of survivorship to the rights which each held in the property of tenants in common. The point is that, on the one hand, the conversion destroys the old tenancy completely and with it every right, title and interest which each tenant had therein, and, on the other, it substitutes a wholly different tenancy therefor. It cannot properly be said—at least not taxwise—we submit, that only one or more of the incidents of the old tenancy are destroyed and the new tenancy created solely as result thereof.

However, by way of buttressing their contention that the right of survivorship is not an interest in property, the friends of the Court argue (Br. 48) that if such right is retained, its value would not be includible in the decedent's gross estate as an interest under Section 811(a) (Appendix *infra*). But the reason that it is not includible therein under Section 811(a) is not that it is not an interest, but that it ceases at his death if his co-tenant survives him.

In this connection, the friends of the Court contend (Br. 45) that such right is substantially similar to a general power of appointment, which has been held not to be an interest in property within the meaning of Section 811(a). They point out (Br. 46) that it requires a separate provision of the statute to include in the decedent's gross estate the value of property with respect to which he possessed such power of appointment at his death, as also a separate provision for the inclusion of

such value therein in the event that he had released such power in contemplation of his death.

But the friends of the Court themselves furnish the answer to this contention. (Br. 45-46.) It is that, unlike the right of survivorship, a power of appointment is not an interest in property at all, and the property subject thereto is for this reason not includible in the decedent's gross estate under Section 811(a), or under Section 811(c) in the event it is released by him in contemplation of his death.

The friends of the Court next contend (Br. 47) that the right of survivorship is similar to the right of dower because, as they assert, such right is not regarded as an interest in property within the meaning of each Section 811(a) or Section 811(c).

But there is no possible analogy between the two rights here. The right of survivorship, whose termination at the decedent's death sweeps the property subject thereto into his gross estate under Section 811(e), is a right which resides in the decedent and is terminated only by his death. On the other hand, the right of dower (or courtesy) which is includible in the decedent's gross estate under Section 811(b) is not his right, but the right of the survivor. It is included because, taking the right of dower as an example, such right was obtained by the decedent's wife in his property as a result of her marriage to him and was then, and at all times thereafter until his death, incohate, being converted at his death and as a result thereof into an absolute right; so that it could, in a tax sense, be regarded as a transfer thereof from him to her at his death. Thus, the reason that it is not includible in his gross estate under Section 811(a), is that ~~because~~ he does not possess that right at any time between the marriage and his death.

And, finally, the friends of the Court contend (Br. 48) that the right of survivorship, being a mere right of

expectancy, is similar to a contingent remainder which has for that reason been held not to be an interest in property within the meaning of Section 811(a) and Section 811(c). But, if we are right in our contention that the right of survivorship is more than a mere expectancy and is an interest in property, then clearly the case of a contingent remainder terminable at death presents no analogy.

However, as we have said, we are not here dealing alone with the relinquishment, termination, or transfer of a right of survivorship. We are dealing with a relinquishment, termination and transfer of a separate and distinct tenancy of property, of which the right of survivorship is only one incident, for the contract in question, by its terms, converts, and its legal effect is to convert, the joint tenancy as a whole into an entirely different tenancy.

Beyond peradventure, therefore, the contract involved a transfer of an interest in the property within the meaning of Section 811(c). This construction of the statute is, moreover, in accord with the elemental principle that a statute is so to be construed as to carry its purpose into effect. Particularly is this true with regard to statutory provisions which are enacted to prevent tax evasion. These must be fairly construed in order to effectuate their purpose. *Taylor* v. *United States,* 3 How. 197; *United States* v. *Stowell,* 133 U. S. 1; *United States* v. *Hodson,* 10 Wall. 395; *United States* v. *Graf Distilling Co.,* 208 U. S. 198; *Farmers' Loan & Trust Co.* v. *Bowers,* 68 F. 2d 916, 923 (C. C. A. 2d), certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582; *Armstrong, Admr.* v. *State, ex rel.,* 72 Ind. App. 303; *In re Fulham's Estate,* 96 Vt. 308, 119 Atl. 433.

Indeed, it is in accord with this principle that, as has already been noted in fn. 7, *supra,* the concept of the word "transfer" as used in Section 811(c) has in

the course of the years been accorded an ever wider connotation by Congress and the courts; a fact which the Supreme Court has frequently recognized. See particularly *Burnet* v. *Guggenheim,* 288 U. S. 280, 286-287, but also *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 337; *Tyler* v. *United States,* 281 U. S. 497; *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 42-43.

However, the friends of the Court (Br. 31) cite *Brown* v. *Routzahn,* 63 F. 2d 914 (C. C. A. 6th), certiorari denied, 290 U. S. 641; *Clark* v. *Commissioner,* 47 B.T.A. 865 (acquiescence 1942-2 Cum. Bull. 4); and *Grasselli* v. *Commissioner,* 7 T.C. 255 (acquiescence 1946-2 Cum. Bull. 2), in support of their contention that a release of the right of survivorship is not a transfer within the meaning of Section 811(c).

As regards *Brown* v. *Routzahn,* it is to be noted that this case involved merely the renunciation by the decedent of testamentary gifts. The court reviewed the Supreme Court cases regarding transfers, including the *Chase Nat. Bank, Tyler* and *Guggenheim* cases, *supra,* and then said that it could not think that the purpose of the contemplation of death statute contemplated the taxing of such renunciation. In this behalf the court said (p. 917):

> Specifically stated, it is our view that, had Elizabeth Brown died in January of 1920, the renunciation here involved, made the following April, could not be held to be a transfer under the statute, even though it were made in contemplation of death. If in that case the renunciation would not be a transfer, neither is it here. The decedent never owned nor had control of the property as donee. All that he had was a right to accept. Coupled with this right was an equal right to reject. Either could be exercised so long as the estate was in administration. He did reject. The government had no fixed prior right such as a precedent judgment creditor might have had. Cf. *Strom* v. *Wood,*

> *supra; Crumpler* v. *Barfield & Wilson Co.,* 114 Ga. 570, 40 S.E. 808; *Schoonover* v. *Osborne,* 193 Iowa, 474, 187 N. W. 20, 27 A.L.R. 465. Its right, as claimed, grew out of the act said to give rise to the tax liability, the exercise of an option. What it did was to collect a tax, not upon the transfer of an interest in property, but upon the exercise of a right to refuse a gift of property. This we think it had no right to do.

Thus, it is obvious that the court was influenced in its decision by the fact that, unlike in the case here, the decedent in that case had never owned or controlled the property there in question; that all he had was a right to accept the testamentary gift, with which was merely coupled an equal right to reject it. We submit that this case presents no analogy to the situation here.

As regards the *Clark* case, it is apparent that the friends of the Court have overlooked the fact that it is in apparent conflict, in principle at least, with the decision of the Supreme Court in *Burnet* v. *Guggenheim, supra.* The *Clark* case is, moreover, also in conflict in principle with both of the *Richardson* cases, decided by the Second Circuit, namely, *Richardson* v. *Commissioner,* 121 F. 2d 1, certiorari denied, 314 U.S. 648, which involved the question as to whether the income from property subject to a donated power was includible in the taxpayer's gross income, and *Richardson* v. *Commissioner,* 126 F. 2d 562, which involved the taxation as a gift resulting from the relinquishment of the power. In the last mentioned case, the taxpayer relied heavily upon the *Clark* case as being one on all fours with the *Richardson* case. But the Second Circuit did not even mention the case. Moreover, as we pointed out in our brief in that case, the Commissioner's acquiescence therein was not based upon an acceptance of its principle, but upon other considerations. We copy in the margin the substance of the explanation

which we made of the acquiescence by way of a footnote in the Government's brief in the *Richardson* case, adding a brief explanation thereto of the acquiescence in the *Grasselli* case, which had not been decided at the time that the *Richardson* case was decided. Such explanation, however, seems adequately to distinguish the situation presented therein from the situation here.[9]

As we have heretofore said, in the *Guggenheim, Chase Nat. Bank, Tyler* and *Sanford* cases, *supra,* a broad connotation was given to the word "transfer" in connection with its use in transactions falling within other than the contemplation of death provision of the stat-

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[9] The basis of the Commissioner's acquiescence in the *Clark* case is as follows: Section 302(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, relating to estate tax, is limited by Section 302(f). But Section 501 of the Revenue Act of 1932, c. 209, 47 Stat. 169, relating to gift taxes, which may be said to be the gift tax counterpart of the estate tax Section 302 (a), has no limiting section comparable to Section 302(f) of the estate tax provisions. Hence, the Commissioner considered that the majority of the Board erroneously decided the case by considering Section 302(a) and (f) and such cases as *Helvering* v. *Grinnell,* 294 U. S. 153. On the other hand, while Section 452(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, expressly makes transfers like that in the *Clark* case taxable, it also provides by Section 452(c) that such transfer is exempt from the tax (even if the release is made under prior law), provided that it is made before January 1, 1943. Thus, while the transfer was deemed taxable under Section 501 of the 1932 Act, because the donee had relinquished the right to capture the corpus, it was thought to fall within the retroactive provisions of Section 452(c) of the 1942 Act, exempting it from the otherwise applicable provisions of Section 452(a) of that Act.

As regards the reason for the acquiescence of the Commissioner in the decision of the Tax Court in the *Grasselli* case, the Bureau file discloses that the taxpayer in that case neither exercised nor released the power of appointment there involved, but had simply by inaction permitted the trustee to pay the income as directed by the settlor. In these circumstances it was concluded that the unexercised power to defeat a gift did not constitute the making of one in the absence of express legislative command. Thus, the case apparently presents a situation which in principle is similar to that presented in the case of *Brown* v. *Routzahn, supra,* upon which the taxpayer also relies and which we have already discussed in the body of the brief.

ute. It has, however, also been frequently applied in connection with its use in the latter provision.

Thus, for example the Supreme Court in *City Bank Co.* v. *McGowan,* 323 U. S. 594, held that orders of the Supreme Court of New York in a guardianship proceeding whereby the court distributed a large portion of an incompetent's estate to the natural objects of her bounty who would succeed to it in any event upon her death, because they did not want to wait until she died, were transfers made by *her* in contemplation of her death, and that, even though the court had no power under state law to make a disposition of an incompetent's property in the nature of a disposition by will. Mr. Justice Roberts speaking for a unanimous Court said (p. 599) that it seemed to the Court to be "sticking in the bark" to hold otherwise.

Another instance may be found in the case of *First Trust & Deposit Co.* v. *Shaughnessy,* 134 F. 2d 940 (C.C.A. 2d), certiorari denied, 320 U. S. 744, where property had been given by the decedent to his wife with the understanding that she should set up an insurance trust, which she did, although she was under no legal obligation to do so, and could have converted the property to her own use. Judge Learned Hand, also speaking for a unanimous court, said that the transfer in trust of the property which she had made in accordance with such agreement was a transfer attributable to him, because, while she need not have made it, still it was made pursuant to an understanding between the decedent and her that it should be made. Moreover, in these circumstances the court held *her* transfer of the property to have been made by the decedent in contemplation of his death. The reason is that no life motive on *his* part was shown to have existed therefor.

In still another case, *Vanderlip* v. *Commissioner,* 155 F. 2d 152, the same court unanimously held, in an

opinion also written by Judge Learned Hand, that a transfer made by the decedent in trust of life insurance policies against which he had borrowed the full loan value, so that they then had substantially no surrender value, was a transfer by him of the *proceeds* of the policies at his death, although the premiums had, at least in part, been thereafter paid with the proceeds of subsequent loans made by the trustee against the policies.

And the Third Circuit, in the case of *United States* v. *Tonkin,* 150 F. 2d 531, 533, certiorari denied, 326 U. S. 771, held that a decedent past insurable age, who had purchased a paid-up life insurance policy in conjunction with an annuity contract, had thereby made a transfer of the proceeds of the policy and contract at his death to the ultimate policy and contract beneficiaries in contemplation of his death.

Moreover, the same court affirmed *per curiam* a decision of the District Court for the Eastern Pennsylvania in the case of *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll,* 137 F. 2d 563, certiorari denied, 321 U. S. 764, in which the District Court had held (50 F. Supp. 249) that the decedent had made a transfer in contemplation of death where he and his wife, holding property conveyed by him to himself and her as tenants by the entirety, had transferred it to her alone for no other apparent reason than to avoid the impact of the federal estate tax. We regard this case as one in point here.

As we have already said, whether the transfers by the decedent of his interest in the joint property require the inclusion of the value of the property subject thereto in its entirety in his gross estate at his death, because they were made in contemplation of his death, will be discussed in our third point, *infra.* It is necessary first, however, to turn aside to dispose of the contention of both the taxpayer and the friends of the Court that the contract entered into between the decedent and his wife

to convert their joint interests in the balance of their property into common property was a sale of the interest of each to the other for an adequate and full consideration in money or money's worth, within the meaning of Section 811(c).

II

The contract entered into between the Decedent and his wife to convert their joint interests in the balance of their property into common property was not a sale of the interest of each therein to the other for an adequate and full consideration in money or money's worth, within the meaning of Section 811(c) of the Code

There are two answers to the contention made by both the taxpayer (Br. 65-67) and the friends of the Court (Br. 13-15) that the transfer of the interest of each in the balance of their jointly owned property to the other, as a result of the contract, was based upon an adequate and full consideration in money or money's worth within the meaning of Section 811(c). The first answer involves state and the second federal law.

The first answer is to be found in the briefs of both the taxpayer and the friends of the Court. It lies in the fact, that as the taxpayer points out (Br. 44) the "termination or severance" of the joint tenancy may be effected by its unilateral release by one joint tenant in favor of the other. And, similarly, by the fact that, as pointed out in the brief of the friends of the Court (p. 8), either joint tenant may sever the tenancy by conveying his interest therein to a third party, and that he may do this even without the knowledge or consent of the other joint tenant; the result being that the grantee becomes a tenant in common with the other original joint tenant. Moreover, as further pointed out by the friends of the Court (Br. 9), an immediate reconveyance by the third party to the grantor makes the latter a tenant in common with his original co-tenant. Of course, no consideration of any kind is required to

effect these results. Obviously, therefore, there is not the slightest basis for any contention that, if such result is effected by an agreement instead of by the unilateral action of one of the parties, such agreement is a sale or that it is to be regarded as being one "for an adequate and full consideration in money or money's worth" within the meaning of Section 811(c).

The second answer is found in the decision of the Supreme Court in the case of *Merrill* v. *Fahs,* 324 U. S. 308. In support of their contention that the contract involved a sale by each to the other of his interest in the property, both the taxpayer (Br. 66) and the friends of the Court (Br. 19-20), cite two cases decided by the Third Circuit, namely, *Ferguson* v. *Dickson,* 300 Fed. 961, certiorari denied, 266 U. S. 628, and *McCaughn* v. *Carver,* 19 F. 2d 126, in both of which that court held release of a dower right to be a sale thereof supported by a "fair consideration" within the applicable provision of the statute. To be sure, at least the friends of the Court point out (Br. 21) that these cases have, as they say, been "*legislatively* reversed." (The italics are those of the friends of the Court.) They argue, however, that such reversal merely related to the holding of the court that such release was based upon a "fair consideration;" they assert that it did not extend to the holding that the release was a "sale." But this is obviously a pointless argument. What the taxpayer and the friends of the Court must here show is that, even if the release of dower or of any other marital interest in property could be called a sale (which it obviously cannot unless it is made upon the payment in money or money's worth), it is one "for an adequate and full consideration in money or money's worth," as required by Section 811(c).

In any event, this contention seems to us to find conclusive answer in the decision of the Supreme Court in

Merrill v. *Fahs, supra,* pp. 312-313, and particularly in the Court's conclusion therein that, without the addition to Section 811(b) of the Congressional direction that a release of such right shall not be considered to any extent a consideration "in money or money's worth," Congress undoubtedly intended the requirement of "adequate and full consideration" to exclude relinquishment of dower and of the marital rights with respect to the estate tax. See also *Taft* v. *Bowers,* 304 U. S. 351, upon which this Court relied in *Giannini* v. *Commissioner,* 148 F. 2d 285, 287.

In the *Giannini* case, this Court held that the existence of a legal consideration under local law in family arrangements was immaterial under tax laws. It is to be noted that in the case at bar the Tax Court relied upon the *Giannini* case, among others, in support of its finding and conclusion that the contract here in question was merely a family arrangement and not to be distinguished for the purposes in hand from that involved in the *Giannini* case.

What seems inexplicable is that, in the circumstances, the friends of the Court neither cited nor discussed the *Merrill, Taft* or *Giannini* cases, particularly the *Giannini* case which, as stated, was relied on by the Tax Court in its opinion and furthermore was briefed and argued on behalf of the taxpayer in this Court by one of their number.

III

The value of the whole property subject to the gift and contract is includible in the Decedent's gross estate

Section 811(c) provides that there shall be included in the decedent's gross estate the value at the time of his death of all property to the extent of any interest therein of which he has made a transfer at any time—in contemplation of his death.

It is to be noted that the interest referred to is that

which is *transferred.* But that was the interest which the decedent had in the property as a joint tenant at the time of the transfers. It was not until both transfers had been consummated that the disposition of all of his interest as a joint tenant in the property had been effected, and that by the contract he had acquired an interest in common with his wife in that portion of it which was subject thereto. Thus the taxpayer's contention that, at best, the decedent by the gift could have made a transfer in contemplation of his death of only one-half of the property which was subject to the gift, and by the contract of only one-half of the balance which was subject thereto (which in any event was includible in his gross estate under Section 811(a)), disregards the nature of the interest he had in the property and had transferred; for such contention, in effect, assumes that such interest was no more than a half interest held by him therein in common with his wife. Clearly, Section 811(c) is not to be circumvented by such hocusing.

To be sure, as the friends of the Court point out in the second footnote found on page 32 of their brief, the Supreme Court in *United States* v. *Jacobs,* 306 U. S. 363, 371, said that until the death of her co-tenant, the wife could have severed the tenancy and thus escaped the application of the estate tax of which she complained. But, obviously, the Court did not have the contemplation of death provision of the statute in mind. It is readily conceivable that leeway must be left to terminate a joint tenancy without risk of incurring the death tax where such severance would subserve only purposes wholly unconnected with the passage of the property at the death of the tenant with whom it originated. Of course, the contemplation of death provision has nothing to do with such transfers. As we have already said, it was thereby intended only to reach substitutes for

testamentary dispositions and thus to prevent the evasion of the tax.

But, in order effectually to do this, it must of necessity be able to reach the whole of the property held in joint tenancy, where the joint tenant with whom it originated has made a transfer of his interest therein in contemplation of his death.

Moreover, such construction of Section 811 does no violence to the joint tenancy concept, or to the Section 811(c) concept of the interest which the decedent has therein and of which he has made a transfer in contemplation of his death.

As was pointed out by Mr. Justice Black in the *Jacobs* case (p. 370), there is such substantial similarity between joint tenancy and tenancy by the entirety as to have moved Congress to treat them alike. The Supreme Court discussed the incidents of ownership in both tenancies, adverting to the fact that in the one as in the other complete ownership in each tenant extended to the whole, quoting in a footnote as illustrative thereof the following description of a joint tenancy made by the Supreme Court of Illinois in *Deslauriers* v. *Senesac,* 331 Ill. 437, 440; 163 N. E. 327:

> The properties of a joint estate are derived from its unity, which is fourfold: the unity of interest, the unity of title, the unity of time and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time and held by one and the same undivided possession.

To this the Supreme Court added a quotation from *Topping* v. *Sadler,* V Jones 357, 360 (N.C.), cited in a note in 30 L.R.A. 305, to the effect that the learning in the books merely shows that in case of a con-

veyance to husband and wife there is a fifth unity, that of person.[10]

Thus, though based on a common law fiction, it may correctly be said that the ownership of each tenant in jointly owned property embraces the whole. If so, Congress obviously not only had the power for the purpose of Section 811(c) to attribute the ownership of the whole to the decedent, but, in the light of its purpose to prevent the evasion of the tax by a transfer thereof in contemplation of death, must be deemed to have exercised such power by the enactment of that section.

Nor does such construction of Section 811(c) do violence to the definition of the word "interest" as used in Section 811(c); for, as we have shown, the interest which the decedent had therein actually extended to and was an interest in the whole.

We, therefore, submit that for the purposes of the contemplation of death provision, it is entirely proper to view the decedent's interest in the jointly held property which originated wholly with him as being an interest in property which is subject only to defeasance in the event he predeceased his wife. Cf. *Helvering* v. *Hallock,* 309 U. S. 106.

Moreover, if, in order to effectuate its purpose to reach substitutes for testamentary dispositions and thus to prevent the evasion of the tax, the contemplation of death provision of Section 811(c) may be so

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[10] We believe that the quoted definition of joint tenancy is no different from that under California law. See the decision of this Court in *Gwinn* v. *Commissioner,* 54 F. 2d 728, 729, which was affirmed by the Supreme Court in 287 U. S. 224. In any case, whatever difference there may be is wholly immaterial so far as concerns the application of the federal estate taxing statute thereto. The reason is that both Section 811(c) and Section 811(e) are intended to have nationwide application with the result that differences in state law are immaterial. See *Estate of Rogers* v. *Commissioner, supra,* p. 414, and *Helvering* v. *Stuart, supra* p. 161.

construed as to reach a transfer made by the decedent's wife (as it was in the case of *First Trust & Deposit Co.* v. *Shaughnessy, supra* (134 F. 2d 940)), or the proceeds of insurance created by the action of the trustee subsequent to the transfer (as in *Vanderlip* v. *Commissioner, supra* (155 F. 2d 152)), or the proceeds of the insurance on the life of a non-insurable person, together with the residue of an annuity contract required to be taken out by the insured (as in *United States* v. *Tonkin, supra* (150 F. 2d 531)), there can, obviously, we think, be no objection to construing such provision here so as to effectuate its purpose by requiring the inclusion of the entire value of the property in the decedent's gross estate. And, if it is "sticking in the bark," as the Supreme Court said in *City Bank Co.* v. *McGowan, supra* (323 U. S., p. 599), to contend that by Section 811(c) Congress did not intend to reach transfers of an incompetent ward's property made by a state court in contemplation of her death, but actually without power to do so, certainly it is "sticking in the bark" to contend that Congress did not thereby intend to reach a transfer of jointly held property which was so made.[11]

In other fields of federal law it has frequently been held that a word or phrase used in the statute should be given a wide connotation in order not to defeat the purpose of the statute. This is so whether it is used in a civil or criminal statute. See, e.g., *United States* v. *Giles,* 300 U. S. 41, where entries in bank books made

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[11] Similarly, the Supreme Court has justified a broad construction of the income tax provisions in order to prevent the evasion of the income tax. See, e.g., *Helvering* v. *Clifford,* 309 U. S. 331, where the income of short term trusts was held attributable to the grantor; *Higgins* v. *Smith,* 308 U. S. 473, where the income of a corporation was held to be attributable to its sole stockholder; *Commissioner* v. *Tower,* 327 U. S. 280, and *Lusthaus* v. *Commissioner,* 327 U. S. 293, where the entire income of a family partnership was held attributable to the husband and father of the other members thereof.

by an innocent person were held attributable to another who had caused them to be made; *United States* v. *Corbett,* 215 U. S. 233, where the Court denied the defendant's contention that the Controller of the Currency, to whom a false report had directly been made, was not an agent appointed to examine the affairs of a bank, within the meaning of the applicable statute. In *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326, the Supreme Court had occasion to define the word "vessel" in the phrase "vessel importing merchandise," so as to include the combination of a vessel and barge, the latter containing the merchandise being transported, so as to relieve the owner of the vessel and barge from liability for negligence in handling the vessel as a result of which the merchandise was lost. The statute limited the liability of the owner of a vessel transporting merchandise to negligence in respect of making it seaworthy and properly manning, equipping and supplying it. And, in *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, 259, the Supreme Court held that the utmost degree of liberality is required in the construction of the word "territory" even in a criminal statute.

It is moreover of no moment that, so construed, the word "interest" has a broader significance than it has in Section 811(a). The contention of the friends of the Court that the word must be regarded as having identical meaning in both subsections, as a basis for their contention that it is a word of art as used throughout the section, is unconvincing.

It is, of course, well settled that, though it is a natural presumption that identical words used in the same statute are intended to have the same meaning, this is not a rigid rule and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they are employed in different parts of the Act

with different intent. This is particularly so where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of legislative power exercised in one case is broader than that exercised in another. In such case the meaning may well vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed and of the circumstances under which the language is employed. *Puerto Rico* v. *Shell Co., supra,* (302 U. S., p. 265); *United States* v. *Raynor,* 302 U. S. 540, 547-548; *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 433-434. In the last cited case, the Court went on to say that it was not unusual for the same word to be used with different meanings in the same Act, and that there was no rule of statutory construction which precluded the courts from giving to the word the meaning which the legislature intended it should have in each instance. The Court cited as an example the fact that the meaning of the word "legislature" used several times in the Federal Constitution differed according to the connection in which it was employed, depending upon the character of the function which that body in each instance is called upon to exercise, citing *Smiley* v. *Holm,* 285 U. S. 355. See also *Helvering* v. *Stockholms &c. Bank,* 293 U. S. 84, where the Court rejected the taxpayer's contention that a comparison ought to be made between the meaning of the words "gross income" as contained in Section 213(b)(4) of the Revenue Act of 1926 and the meaning of the same words as used in Section 217(a) thereof, citing and quoting from the *Atlantic Cleaners & Dyers* case. Thus the everliving truth of what Mr. Justice Holmes said in *Towne* v.

Eisner, 245 U. S. 418, 425, is strikingly again illustrated here:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Thus, here, subsection (a) of Section 811 is self-contained and deals only with interests in the ordinary sense which the decedent had in property at the date of his death. Every other subsection of Section 811, however, except Section 811(c), deals with interests or rights in property which are not includible in the decedent's gross estate under subsection (a), at least not to the extent provided therein. By contrast, subsection (c) is a special provision, more in the nature of a catch-all, designed generally to sweep into the gross estate interdicted *inter vivos* transfers of interests in property which would otherwise be includible not only under subsection (a), but under other subsections as well. Thus, for example, it has repeatedly been held that transfers of life insurance normally includible under subsection (g), which were made in contemplation of death, are includible under subsection (c). See, e.g., *First Trust & Deposit Co.* v. *Shaughnessy, supra* (134 F. 2d 940); *Vanderlip* v. *Commissioner, supra* (155 F. 2d 152); *Davidson's Estate* v. *Commissioner,* 158 F. 2d 239 (C.C.A. 10th); *Thomas* v. *Graham,* 158 F. 2d 561 (C.C.A. 5th), as also Section 81.25 of Treasury Regulations 105.[12]

In the very nature of things, the word "interest"

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[12] The fact that Congress specifically provided for the inclusion in the gross estate of property subject to certain powers which were relinquished in contemplation of death does not detract from these considerations. As we have heretofore pointed out under our first point, *supra,* these involve *rights* in the property rather than *interests* therein.

would be used with broader meaning in subsection (c) than in subsection (a).

Since the friends of the Court leave us at this point, we are now able to evaluate their contentions in retrospect. The outstanding fact with regard thereto is that they have undertaken to construe the contemplation of death provision of the statute without giving consideration to the fact that it is such. And, in the course of so doing, they have taken the words "interest" and "transfer," as well as the phrase "for an adequate and full consideration in money or money's worth." out of their setting and undertaken to construe them separately and apart from their context. As Mr. Justice Holmes aptly remarked of similar conduct on the part of the taxpayer's counsel in *Edwards* v. *Chile Copper Co.,* 270 U. S. 452, 455, "we cannot let the fagot be destroyed by taking up each item separately and breaking the stick." Moreover, the friends of the Court have attempted to do this in this case solely in order to defeat the manifest purpose of the contemplation of death provision of Section 811(c) to prevent evasion of the estate tax by *inter vivos* transfers made in contemplation of death. As we have said, the decedent in this case disposed of all of his earthly possessions by the gift, the contract and his will, and the friends of the Court do not even pretend that such disposition was not made by him in contemplation of his death.

And this brings us to the last and what, as we have already said, we regard as the primary question in this case, namely, whether the transfers were made by the decedent in contemplation of his death.

IV

The gift and contract were substitutes for testamentary dispositions and were made by the Decedent in contemplation of his death within the meaning of Section 811(c)

In *Koch* v. *Commissioner,* 146 F. 2d 259, this Court recognized that whether a transfer is made in contemplation of death is, generally speaking, a question of fact and that the Tax Court rather than the Court of Appeals must draw the inferences from the facts and choose between conflicting ones. In support, the Court cited numerous authorities, including the case of *Colorado Bank* v. *Commissioner,* 305 U. S. 23. As we pointed out in our brief in the *Koch* case, this is so whether the trier of the fact is the Board of Tax Appeals (now the Tax Court), as it was in the *Colorado Bank* case, or the District Court, as it was in *McCaughn* v. *Real Estate Co.,* 297 U. S. 606. See also *Flack* v. *Holtegel,* 93 F. 2d 512 (C. C. A. 7th), and *Oliver* v. *Bell,* 103 F. 2d 760 (C. C. A. 3d). While the District Court cases abovementioned were tried before the federal rules of civil procedure were adopted, findings made on conflicting evidence by a District Court and inferences drawn therefrom since the adoption of the rules should not be rejected by the Court of Appeals unless clearly wrong. *Walling* v. *General Industries Co.,* 330 U. S. 545, 550. Of course, the same rule now obtains as regards findings of the Tax Court under Section 1141(a), as amended by Section 36 of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess.

But the case at bar is not one in which the findings could by any stretch of the imagination be said to be clearly erroneous. To the contrary, the evidence in the case shows that we run the entire gamut of reasons for holding that the transfers in question were made by the decedent in contemplation of his death within the meaning of Section 811(c).

Thus, the transfers were made by him in contemplation of his death in the basic meaning of the phrase; that is, they were made in anticipation of his death in fear or expectation that it might not be long delayed. Secondly, the transfers were substitutes for a testamentary disposition of the property, and with the decedent's will constituted an integral part of a final disposition of all of it. And, finally, there is no evidence to justify a finding that, in making the transfers the decedent was dominated by a life purpose or purposes. On the other hand, the evidence beyond question sustains the finding that the gift, contract and will constituted an integrated transaction designed for the purpose of making a final disposition of all of the decedent's property and to do so in order to evade the federal tax, at least in part.

As regards the first of these reasons, it appears that, although the decedent and his wife contemplated making some sort of a gift to their son as early as the first part of September, 1943, they originally intended to make only a relatively small one, not more than sufficient to enable them to pay his debts, whatever they were. Even when the decedent and his wife consulted the lawyer Triplett in the latter part of September and were by him advised that they might make a gift of as much as $33,000 which would be free from the gift tax, they left without having made a gift, or any arrangements for making it, and with the statement (attributed to the decedent's wife) that they had not intended to make that large a gift, but only of about one-half of that amount. It was not until after the decedent had been taken ill and had consulted a doctor that, within a few days thereafter, he and his wife went to see the attorney without even an appointment and arranged to make a gift of that amount—exactly of $33,526.54. This was on November 9th. The decedent had consulted the

doctor on November 7th and before that on October 27th. His visits to the doctor thereafter continued apace. On November 18, 1943, he was examined again, and on the next day he made the gift. In the meantime, the attorney had suggested the conversion of the balance of the property from joint to common, so as to avoid the federal estate tax upon the whole thereof in the event of the decedent's death. On November 21st, the decedent entered a hospital for an extended examination, remaining there until the 24th and going from there directly to a conference with the attorney which the decedent's son had arranged for by a telephone call made from the hospital.[13]

Since the gift had then already been consummated, no reason for such conference at the time is suggested or apparent other than the signing of the contract to convert the balance of the joint property into common property and to arrange for the making of the wills. Indeed, the contract was signed at that meeting and the provisions of the new wills were determined upon. At this conference also a number of deeds of property to the son were executed by the decedent and his wife. It is to be noted that the diagnosis made by the doctors whom the decedent had up to that time consulted was "obstructive jaundice" and "probable ca of pancreas." (R. 46.)

Two days later, on November 26, 1943, a letter was written identifying the securities which were the subject of the gift and four days after, that is on November 30th, the wills were executed.

While it does not affirmatively appear that the doctors had advised the decedent of the entire diagnosis, still it is apparent that the decedent was concerned

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[13] The decedent apparently returned to the hospital, for he was not discharged therefrom until November 25, 1943. The hospital record of that day shows that he was then sent home, to return later for completion of work. (R. 45.)

about his condition. For, while he did not tell the attorney what the doctors had said to him about it, except that he had something wrong with his gall-bladder (R. 194) and that the bile was not going through (R. 200), he further said that the X-rays did not show anything, and that he did not think the doctors knew what they were talking about. Clearly, this could not have referred to what they had said about his gall-bladder, for his jaundiced condition alone amply supported the doctors' statement with reference to that. The decedent's statement that he did not think the doctors knew what they were talking about must therefore have had reference to what they told him otherwise about his condition, and this could only have been that they suspected cancer of the pancreas, from which, indeed, he was actually suffering.

In any event, within ten days after he had made his will, he entered another hospital under the care of another doctor and with the same ailments, namely, jaundice of uncertain origin and cancer of the pancreas. This doctor apparently operated only on the gall-bladder in order to drain it and thus to relieve the jaundice. In a delirium which followed, the decedent tore the drain out, thus necessitating a second operation which was had, and a few days later he died.

The cases are legion in which transfers made by decedents in conditions of age and health similar to those here, were found to have been made in contemplation of death, such findings being sustained by the appellate courts on the ground that the evidence was sufficient to do so. See, e.g., the decision of this Court in *Koch* v. *Commissioner,* already referred to, as well as those in the cases therein cited, such as *Flack* v. *Holtegel, supra* (93 F. 2d 512); *Oliver* v. *Bell, supra* (103 F. 2d 760); *Smails* v. *O'Malley,* 127 F. 2d 410 (C.C.A. 8th); *McGrew's Estate* v. *Commissioner,* 135 F. 2d 158

(C.C.A. 6th); also *Myers* v. *United States,* 2 F. Supp. 1000 (C. Cls.); *Gregg* v. *United States,* 13 F. Supp. 147 (C. Cls.); *Harris Trust & Savings Bank* v. *United States,* 29 F. Supp. 876 (C. Cls.); *Griffith* v. *United States,* 32 F. Supp. 884 (C. Cls.); *Russell* v. *United States,* 38 F. Supp. 438 (C. Cls.); *Central Nat. Bank of Cleveland* v. *United States,* 41 F. Supp. 239 (C. Cls.); *Stanley* v. *United States,* 46 F. Supp. 988 (C. Cls.). See also *Kengel* v. *United States,* 57 F. 2d 929 (C. Cls.), which presents the interesting phenomenon of transfers shown by direct evidence to have been made by the decedent in anticipation of his death. Of course, as stated in a number of the decisions of the Courts of Appeals, the fact that the appellate court might have reached a different conclusion if it had been the trier of the facts in these cases is wholly immaterial.

The second reason why the finding that the transfers were made by the decedent in contemplation of his death is conclusive is that they were substitutes for testamentary dispositions of a part of his property and formed an integral part of a complete disposition thereof in conjunction with the wills. While a gift of some property to the son was first contemplated, the fact of the matter is that it was of a relatively small amount. What is significant, however, is the fact that the ultimate making of a gift of a larger amount than was originally contemplated appears to have been the occasion for the decedent's giving consideration to a final disposition of all of his property. That the gift was finally consummated in the largest amount that could be made free of the gift tax is significant in that this indicates the decedent had no idea of ever making another *inter vivos* gift, but that he intended to dispose of the balance of his property by the contract and his new will.

Whether step transactions, such as those here, con-

stitute a single integrated scheme for a complete and final disposition of one's property is itself, obviously, a question of fact. And with respect to it, the finding of the Tax Court is conclusive if there is substantial evidence to sustain it. *Dobson* v. *Commissioner,* 320 U. S. 489, 502, citing Randolph E. Paul's classic study on step transactions. The *Dobson* case was followed on this point by this Court in *Heller* v. *Commissioner,* 147 F. 2d 376, 378, and again in *Commissioner* v. *Rainier Brewing Co.,* 165 F. 2d 324, 325. It is to be noted that in the *Heller* case, the pertinent part of the Dobson opinion is quoted and that this Court italicized for emphasis the following portion thereof to the effect that "the Tax Court's selection of the course to follow is no more reviewable than any other question of fact."

Other courts have likewise followed the *Dobson* case in this respect. See, e.g., *Hunter* v. *Commissioner,* 140 F. 2d 954, 955 (C.C.A. 5th); *Commissioner* v. *Breyer,* 151 F. 2d 267, 272 (C.C.A. 3d); *Okonite Co.* v. *Commissioner,* 155 F. 2d 248, 251 (C.C.A. 3d); *Thermoid Co.* v. *Commissioner,* 155 F. 2d 589, 591 (C.C.A. 3d). Indeed, long before the *Dobson* case was decided, Judge Learned Hand said in *Helvering* v. *New Haven & S. L. R. Co.,* 121 F. 2d 985, 988:

> As for the effort of the Commissioner to atomize the plan, as it were; i.e., to separate it into its several steps and treat the last as though it stood alone, it has been repeatedly repudiated. *Prairie Oil & Gas Co.* v. *Motter,* 10 Cir., 66 F. 2d 309; *Bassick* v. *Commissioner,* 2 Cir., 85 F. 2d 8; *Helvering* v. *Elkhorn Coal Co.,* 4 Cir., 95 F. 2d 732; *Snowden* v. *McCabe,* 6 Cir., 111 F. 2d 743.

It is particularly worthy of note here that in *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630, 637, the Supreme Court in a contemplation of death case refused to disturb a finding of the District Court, which the Fifth

Circuit had accepted (149 F. 2d 120), that transfers in trust made by the decedent in 1925, additions made thereto by him nine years later, in 1934, and a release of a power to amend the trusts, made by him three years later, in 1937, constituted an integrated transaction.

Thus, the making of a larger gift than one originally contemplated is not to be accounted for primarily on the ground that the decedent and his wife desired to give their son some financial relief by way of assuring him of additional income. It is to be accounted for only by the fact that the gift of such amount was tax-free and that it fell within the wider scheme for a complete and final disposition of all of the property. The only reasonable inference to be drawn from all the facts is that the decedent had the final disposition of his property in mind when he made the gift and that his dominant purpose for making the gift and contract, judged in the light of his age and health and the situation in which his family was placed, and the fact that at the same time he disposed of the balance of his property by a new will, was to make a final disposition of his property so as to put his house in order against the possibility of his dying in the not too distant future. There can be little doubt, therefore, that he made the transfers "in contemplation of his death," as that phrase has been defined by the Supreme Court not only in *United States* v. *Wells, supra* (283 U. S. 102), but in *City Bank Co.* v. *McGowan, supra* (323 U. S. 594); and in *Allen* v. *Trust Co. of Georgia, supra,* (326 U. S. 630), in which the Supreme Court undertook to clarify the definition made thereof by it in the *Wells* case. See also in this connection *Farmers' Loan & Trust Co.* v. *Bowers, supra,* (68 F. 2d 916 (C.C.A. 2d), certiorari denied, 293 U. S. 565; 296 U. S. 649; 299 U. S. 582); *Updike* v. *Commissioner,* 88 F. 2d 807 (C.C.A. 8th), certiorari denied, 301 U. S. 708; *In re Kroger's Estate, supra* (145 F. 2d 901

(C.C.A. 6th), certiorari denied, 324 U. S. 866); *Pate* v. *Commissioner,* 149 F. 2d 669 (C.C.A. 8th); *Thomas* v. *Graham, supra* (158 F. 2d 561 (C.C.A. 5th)); *Humphrey's Estate* v. *Commissioner,* 162 F. 2d 1 (C.C.A. 5th), certiorari denied, 332 U. S. 817; *O'Neal's Estate* v. *Commissioner,* 170 F. 2d 217 (C.C.A. 5th); *Scofield* v. *Bethea* (C.C.A. 5th), decided November 9, 1948, not yet reported. Thus, in the case of *O'Neal's Estate, supra,* the Fifth Circuit said (p. 220):

> Moreover, it has been repeatedly held that where a decedent creates a substitute for a testamentary disposition of his property, instead of permitting it to pass under his will or under the intestacy laws, he is thereby making a transfer in contemplation of death within the meaning of the statute.

citing a number of the Supreme Court and other cases above cited.

The third reason is that the taxpayer has wholly failed to show a like motive for the dispositions the decedent had made, even assuming that it was possible to do so. The only specific motive which appears is that of tax avoidance and that is apparently insufficient. *Allen* v. *Trust Co. of Georgia, supra; Farmers' Loan & Trust Co.* v. *Bowers, supra* (68 F. 2d 916); *First Trust & Deposit Co.* v. *Shaughnessy, supra* (134 F. 2d 940). As the Fifth Circuit said in the case of *O'Neal's Estate* already cited and quoted from (pp. 219-220):

> In view of his advanced age and simultaneous execution of the new will at the time the trusts were created, the burden of proof to establish a motive which would exclude the transfer to the wife was upon his estate, and it has clearly failed to meet that burden.

citing not only the *First Trust & Deposit Co.* case, but also the *Farmers' Loan & Trust Co.* case, *supra.*

The taxpayer's attempt to justify the gift as tax-free because, in its view, it was motivated by a desire to give additional income to the son, not only disregards the fact that the gift has been found by the Tax Court to have been a part of an integrated transaction for the final disposition of all of the decedent's property, but the fact that, if the transfer is shown to be within the statute, the co-existence of a possible life motive with the dominant death motives therefor does not suffice to remove it therefrom. Sight should not be lost of the fact that the statute requires the inclusion in the gross estate of transfers which are made "in contemplation of death," not alone those which are *solely* so made. Thus, if, as here, the tax evasion motive plays any substantial part in the making of the transfer, it may—indeed it should—properly be regarded as falling within the ambit of the statute. This is so even in a criminal case. For, in this behalf, the Supreme Court said in *Spies* v. *United States,* 317 U.S. 492, 499:

> If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

Similarly, in a correlated field of tax law, the Supreme Court has *sua sponte* announced and applied precisely that principle. Reference here is to the case of *Helvering* v. *Stock Yards Co.,* 318 U.S. 693. In that case, the Court said that the mere existence of a purpose in the taxable year to avoid the surtax on its sole stockholder, motivating the accumulation of its gains and profits beyond the reasonable needs of its business, subjected the corporation to the fifty per cent penalty tax, even though the original purpose of the accumulation on his part, which was to gain control of the Chicago Stock Yards enterprise, long antedated the original statute and persisted in the taxable year. In this behalf Mr.

Justice Roberts, speaking for a unanimous Court, said (p. 699):

> The Board's conclusion may justifiably have been reached in the view that, whatever the motive when the pratice of accumulation was adopted, the purpose of avoiding surtax induced, or aided in inducing, the continuance of the practice.

Even long prior thereto, however, both federal and state courts had so applied the contemplation of death statute. Thus, for example, years ago, Judge Cant of the District Court of Minnesota in *Anneke* v. *Willcuts,* 1 F. Supp. 662, stated what he regarded the rational solution of the problem, which he deemed justified under principles laid down in the *Wells* case. After having pointed out that a purpose to avoid the estate tax brought a transfer so motivated within the statute, he said:

> The past policy of the grantor, or his having considered making the particular transfer for some time in advance concurs with the circumstance that the transfer is made in contemplation of death. If the latter is one of the substantially inducing elements entering into the transfer, the tax will attach. If the rule were otherwise, a man known to be suffering from a progressive and incurable malady, and who had not long to live, but who had such a policy or plan, might continue with the distribution of his estate up to the day of his death, and all such distributions escape the payment of a tax. There have already been too many cases which have nearly approached a holding as reprehensible as that would be. *No matter what the policy, and no matter what the plans, if there was such indefiniteness or uncertainty in connection therewith, that one of the substantially inducing causes or motives for closing the matter when it was closed, was the contemplation of death, the reason for the tax then applies and it would not be within the*

power of the court to give relief therefrom. [Italics supplied.]

State court decisions are in accord. Thus in *Dommerich* v. *Kelly,* 132 N. J. Eq. 220, the court in that connection said (p. 225):

> It may be supposed that there are frequently a variety of desires or motives of gradational persuasibility which cooperate to induce a donor to make *inter vivos* transfers. It is not a requisite of taxability that contemplation of death should have been the sole motive for the transfers.

citing numerous authorities. And *In re Hartford,* 122 N. J. Eq. 489, affirmed sub nom. *Hartford* v. *Martin,* 120 N.J.L. 564, affirmed, 122 N.J.L. 283, the same court put the matter this way (p. 491):

> Furthermore, even if the desire aforesaid [to perpetuate control of stock in the decedent's two sons] was *an* impelling motive for the transfer, and one without which the transfer would not have been made, it is nevertheless clear that it was not the only impelling motive for so much of the transfer as constitutes the "testamentary disposition;" and that, for that part of the transfer, the desire and intent to accomplish an ultimate disposition and distribution of his estate in lieu of a testamentary disposition in that behalf, was an impelling motive without which such ultimate disposition would not have been thereby effected. It is not a requisite of taxability that the contemplation of death should have been the sole motive for the transfer.

Other state court decisions to the same effect are given in the margin.[14]

Beyond peradventure, therefore, both the decisions of the Second Circuit in the *Astor* case (*Farmers' Loan*

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[14] *Estate of Boole,* 98 Cal. App. 714, 722; *Sellinger's Adm'r* v. *Reeves,* 1942, 292 Ky. 114, 119; 166 S. W. 54, 57.

& Trust Co. v. *Bowers, supra,* (68 F. 2d 916, certiorari denied, 293 U.S. 565, 296 U.S. 649), 299 U.S. 582, and *Farmers' Loan & Trust Co.* v. *Bowers,* 98 F. 2d 794, certiorari denied, 306 U.S. 648, 307 U.S. 651, 308 U.S. 634; 310 U.S. 657), holding that a substantially contributing death purpose brings a transfer within the statute (in that case a purpose to avoid the tax), rest upon a firm foundation.

In connection with its contention that the gift was not made in contemplation of death, the taxpayer asserts (Br. 53), and repeats the assertion (Br. 59) in connection with its contention that the contract was not so made, that in the case of *Allen* v. *Trust Co. of Georgia, supra,* the Supreme Court repudiated the test that a motive associated with death, such as the avoidance of estate taxes, need only be substantial in order to sweep a transfer or release motivated thereby into the gross estate, as groundless. But such assertion obviously rests upon a misinterpretation of the Supreme Court's holding in that case. The decedent therein had, many years prior to his death, set up certain trusts for his improvident children in order to insure an adequate livelihood to each. He had, however, reserved a power to amend the trusts in conjunction with the beneficiaries and the trustee in the belief that, under the law as it then existed, such reservation would not attract the federal death tax. The decedent's purpose was to set up spendthrift trusts which could not be reached by creditors and would be free from all taxes, both state and federal. He released the power only when and immediately that he was advised of a then fairly recent decision of the Supreme Court that its retention would sweep the trust estates into his gross estate at his death. It was conceded that the original transfers in trust were not made by the decedent in contemplation of his death; and, as the Supreme Court

pointed out in its opinion (p. 937)—a fact to which we have already adverted—the concurrent findings of both lower courts, which it was not at liberty to disturb, were that the establishment of the trusts in 1925, their enlargement in 1934, and the release of the power in 1937, constituted one integrated transaction. On these facts the Court concluded that the decedent's desire to avoid death taxes by the release did no more than establish that he did not want his plan to underwrite the needs of his children and grandchildren jeopardized.

While the Supreme Court assertedly granted certiorari in that case because of an alleged conflict between the decision of the Fifth Circuit therein and those of the Second Circuit in the *Astor* case, it did not resolve such alleged conflict for the obvious reason that it regarded the case before it distinguishable from the *Astor* case.

The fact of the matter is that the decisions of the Second Circuit in the *Astor* case have never been successfully assailed, but to the contrary have assumed an ever wider importance in this field of the law. The only case in which an attempt was made to assail them is *Denniston* v. *Commissioner,* 106 F. 2d 625 (C.C.A. 3d), cited by the Supreme Court in fn. 2, p. 33 of its opinion in the *Allen* v. *Trust Co. of Georgia* case, wherein the *Astor* decisions are likewise cited. But the *Denniston* case (p. 33, fn. 2), must be regarded as having in effect been overruled by the Third Circuit in virtue of its *per curiam* affirmance of the case of *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra* (137 F. 2d 653, rehearing denied September 20, 1943), the opinion of the District Court of the United States for the Northern District of Pennsylvania being reported in 50 F. Supp. 949. It is to be noted that the District Court had rested its decision, that the tranfer there in question was made in contemplation

of death, on the proposition that a purpose to avoid the tax was alone sufficient to sweep a transfer so motivated into the decedent's gross estate. Although the taxpayer in that case strenuously urged upon the Circuit Court of Appeals that the District Court's decision was in conflict with its own prior decision in the *Denniston* case, the Third Circuit did not even so much as even mention it.

In any event, if the problem is viewed in the light of the broad purpose of the estate tax, namely, to levy a tax in respect of the passage of property from one generation to the next, little difficulty will be encountered in dealing with alleged life motives for transfers whose effect is to do just that. That the motive for a transfer may be judged by its effect cannot be disputed. As Randolph E. Paul states in his study on Motive and Intent in Federal Tax Law, Selected Studies in Federal Taxation (Second Series, 1938) 255, 273, "Effects are a fairly reliable pragmatic test of motive," citing the opinion of Mr. Chief Justice Hughes (who, of course, also wrote the decision in the *Wells* case), in *Texas & N. O. R. Co.* v. *Ry. Clerks,* 281 U.S. 548, wherein he said (pp. 559-560):

> Motive is a persuasive interpreter of equivocal conduct, and the petitioners are not entitled to complain because their activities were viewed in the light of manifest interest and purpose. The most that can be said in favor of the petitioners on the questions of fact is that the evidence permits conflicting inferences, and this is not enough.

Beyond peradventure, therefore, the evidence in this case is amply sufficient to warrant the Tax Court's finding and should not be disturbed. As a matter of fact, we believe that, if this Court had sat as the trier of the fact, it could have reached no other conclusion.

CONCLUSION

For the foregoing reasons, the decision of the Tax Court should be affirmed.

Respectfully submitted,

Theron Lamar Caudle,
Assistant Attorney General.
Ellis N. Slack,
Carlton Fox,
Special Assistants to the Attorney General.

December, 1948.

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * * *

(e) [As amended by Sec. 402(b), Revenue Act of 1942, c. 619, 56 Stat. 798] *Joint and Community Interests.*—

(1) Joint Interests.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

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(26 U.S.C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.15. *Transfers during life.*—The following classes of transfers made by the decedent prior

to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * (4) transfers under which the decedent retained the right, either alone or in conjunction with another person or persons, to designate who should possess or enjoy the property or the income therefrom (see section 81.19); and (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see sections 81.20 and 81.21).

The value of transferred property includible in the gross estate is the value thereof at the date of decedent's death, or if the executor has duly elected pursuant to the provisions of section 811(j) to have the value of the gross estate determined as of the dates therein prescribed, then the value will be that as of the applicable date or dates so prescribed (see section 81.11). If a portion only of the property was so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in ascertaining the value of the gross estate.

* * * * *

SEC. 81.16. *Transfers in contemplation of death.* —Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that

general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary deemed to have been made in contemplation of death.

*   *   *   *   *

Sec. 81.22. *Property held jointly or by the entirety.*—The foregoing provisions of the Internal Revenue Code extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. They specifically reach property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. Section 811(e) applies to all classes of property, whether real or personal, in case the survivor takes the entire interest therein by right

of survivorship and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

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